COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

DATE: May 14, 2004

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 13 and 14, 2004, in Washington, D.C. The Committee approved all of the proposed amendments that had been published for comment in August 2003, including the controversial rule regarding the citation of unpublished opinions.* The Committee also removed three items from the Committee's study agenda, tentatively approved one item for publication, and, at the request of the E-Government Subcommittee, discussed a draft rule intended to protect private information in court filings.

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II. Action Items

Several proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") were published for comment in August 2003.

The comments received by the Advisory Committee were unusual in several respects. First, we received an extraordinarily large number of comments: 513 written comments were submitted, and 15 witnesses testified at a public hearing on April 13. By contrast, a much more extensive set of proposed amendments published in August 2000 attracted 20 written comments and no requests to

* At its June 2004 meeting, the Standing Rules Committee recommitted the proposed new Rule 32.1 on unpublished opinions for further study to the advisory rules committee.

testify. Second, the overwhelming majority of the comments — about 95 percent — pertained *only* to proposed Rule 32.1 (regarding the citing of unpublished opinions).

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Because of the unusual nature of the public comments, I will report on them somewhat differently than we have reported on public comments in the past. With respect to every proposed rule except Rule 32.1, I will provide the following: (1) a brief introduction; (2) the text of the proposed amendment and Committee Note, as approved by the Committee; (3) a description of the changes made after publication and comments; and (4) a summary of each of the public comments. With respect to proposed Rule 32.1, I will provide the same information, except that I will not individually summarize each of the 513 written comments and each of the 15 statements given at the public hearing. Instead, I will summarize the major arguments made for and against adopting Rule 32.1, and then I will identify all those who supported or opposed the rule.

As I noted, the Advisory Committee approved all of the proposed amendments for submission to the Standing Committee. Modifications were made to most of the proposed amendments and Committee Notes, but, in the Committee's view, none of the modifications is substantial enough to require republication.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

A. Rule 4(a)(6)

1. Introduction

Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. A district court is authorized to reopen the time to appeal a judgment if the district court finds that several conditions have been satisfied, including that the appellant did not receive notice of the entry of the judgment within 21 days and that the appellant moved to reopen the time to appeal within 7 days after learning of the judgment's entry. The Committee proposes to amend Rule 4(a)(6) to clarify what type of notice must be absent before an appellant is eligible to move to reopen the time to appeal and to resolve a four-way circuit split over what type of notice triggers the 7-day period to bring such a motion.

2. Text of Proposed Amendment and Committee Note

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period

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*New material is underlined; matter to be omitted is lined through.

of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from~~

~~the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what type of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one substantive change has been made. As amended, the subdivision will preclude a party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision

(a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* type of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what type of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split by providing that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases — cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, an appeal cannot be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.

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3. Changes Made After Publication and Comments

No change was made to the text of subdivision (A) — regarding the type of notice that precludes a party from later moving to reopen the time to appeal — and only minor stylistic changes were made to the Committee Note to subdivision (A).

A substantial change was made to subdivision (B) — regarding the type of notice that triggers the 7-day deadline for moving to reopen the time to appeal. Under the published version of subdivision (B), the 7-day deadline would have been triggered when "the moving party receives or observes written notice of the entry from any source." The Committee was attempting to implement an "eyes/ears" distinction: The 7-day period was triggered when a party learned of the entry of a judgment or order by reading about it (whether on a piece of paper or a computer screen), but was not triggered when a party merely heard about it.

Above all else, subdivision (B) should be clear and easy to apply; it should neither risk opening another circuit split over its meaning nor create the need for a lot of factfinding by district courts. After considering the public comments — and, in particular, the comments of two committees of the California bar — the Committee decided that subdivision (B) could do better on both counts. The published standard — "receives or observes written notice of the entry from any source" — was awkward and, despite the guidance of the Committee Note, was likely to give courts problems. Even if the standard had proved to be sufficiently clear, district courts would still have been left to make factual findings about whether a particular attorney or party "received" or "observed" notice that was written or electronic.

The Committee concluded that the solution suggested by the California bar — using Civil Rule 77(d) notice to trigger the 7-day period — made a lot of sense. The standard is clear; no one doubts what it means to be served with notice of the entry of judgment under Civil Rule 77(d). The standard is also unlikely to give rise to many factual disputes. Civil Rule 77(d) notice must be formally served under Civil Rule 5(b), so establishing the presence or absence of such notice should be relatively easy. And, for the reasons described in the Committee Note, using Civil Rule 77(d) as the trigger will not unduly delay appellate proceedings.

For these reasons, the Committee amended subdivision (B) so that the 7-day deadline will be triggered only by notice of the entry of a judgment or order that is served under Civil Rule 77(d). (Corresponding changes were made to the Committee Note.) The Committee does not believe that the amendment needs to be published again for comment, as the issue of what type of notice should trigger the 7-day deadline has already been addressed by commentators, the revised version of subdivision (B) is far more forgiving than the published version, and it is

highly unlikely that the revised version will be found ambiguous in any respect.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

Prof. Philip A. Pucillo of Ave Maria School of Law (03-AP-007) points out that subdivisions (A) and (C) begin with "the court finds," whereas subdivision (B) does not. He wonders whether there is a reason for this, such as an attempt to "emphasiz[e] that the determinations to be made in subsections (A) and (C) are factual findings subject to 'clearly erroneous' review, while the subsection (B) determination is a different creature." If no such reason exists, he recommends deleting "the court finds" in subdivisions (A) and (C) "as extraneous and potentially confusing."

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendment.

Jack E. Horsley, Esq. (03-AP-011) supports the proposed amendment.

Philip Allen Lacovara, Esq. (03-AP-016) supports the substance of the proposed amendment, but regards the use of the term "observes" in subdivision (B) as "clumsy and obscure." He suggests substituting "obtains" or "acquires." He points out that the Committee Note would make clear the full scope of either term.

Robert Bstart (03-AP-071), a litigant whose appeal in a civil case was dismissed as untimely, recommends that Rule 4 be amended to apply a rule similar to the "prison mailbox rule" of Rule 4(c) to civil litigants who are not incarcerated.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment. It agrees that the deadline to move to reopen the time to appeal should be triggered only by written notice, and that "[e]xtending written notice to observation on the Internet is certainly appropriate."

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) supports proposed subdivision (A), which it believes helpfully clarifies that only formal notice of the entry of judgment under Civil Rule 77(d) forecloses a party from later moving to reopen the time to appeal. The Committee objects to proposed subdivision (B), though, both because it is unclear about what type of event triggers the 7-day deadline and because it is likely to lead to litigation over whether such an event occurred (for example, over whether an attorney who checked a docket actually "observed" that judgment had been entered). The Committee urges that subdivision (B) be revised so that only Civil Rule 77(d) notice triggers the 7-day deadline.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) agrees with the Committee on Appellate Courts.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

B. Washington's Birthday Package: Rules 26(a)(4) and 45(a)(2)

1. Introduction

During the 1998 restyling of the Appellate Rules, the phrase "Washington's Birthday" was replaced with "Presidents' Day." The Advisory Committee concluded that this was a mistake. A federal statute — 5 U.S.C. § 6103(a) — officially designates the third Monday in February as "Washington's Birthday," and the other rules of practice and procedure — including the newly restyled Criminal Rules — use "Washington's Birthday." The Committee proposes to amend Rules 26(a)(4) and 45(a)(2) to replace "Presidents' Day" with "Washington's Birthday."

2. Text of Proposed Amendments and Committee Notes

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~

Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

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Committee Note

Subdivision (a)(4). Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

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(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

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Committee Note

Subdivision (a)(2). Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

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3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendments.

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendments.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendments.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

C. New Rule 27(d)(1)(E)

1. Introduction

The Committee proposes to add a new subdivision (E) to Rule 27(d)(1) to make it clear that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motion papers. Applying these restrictions to motion papers is necessary to prevent abuses — such as litigants using very small typeface to cram as many words as possible into the pages that they are allotted.

2. Text of Proposed Amendment and Committee Note

Rule 27. Motions

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(d) Form of Papers; Page Limits; and Number of Copies.

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all

four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

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Committee Note

Subdivision (d)(1)(E). A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

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3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendment, but "only if the current page limits of Rule 27(d)(2) . . . are revised" — either to increase the number of pages (to 24 pages for motions and 12 pages for replies) or to express the limits in words instead of pages (5600 words for motions and 2800 words for replies). Public Citizen points out that most circuits now allow motions to be filed in 12- or even 11-point proportional font. Thus, the proposed amendment will substantially reduce the content of motion papers in most circuits. Increasing the page limits (or stating them in words, as Public Citizen would prefer) would compensate for this reduction and is justified by the fact that some motions — particularly dispositive motions — can be quite complex and require considerable briefing.

Matthew J. Sanders, Esq. (03-AP-122) supports the proposed amendment and recommends that the Committee go further and amend Rule 27 so that it imposes word limits, rather than page limits, on motions. He believes that the benefits of imposing word limits on briefs — "instead of worrying about altering paragraphs, headings, and sentence structure to meet a page limit, lawyers could spend more time on the substance of their work and simply follow a word limit" — would "apply equally to motions."

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendment.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

D. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d)

1. Introduction

The Appellate Rules say very little about briefing in cases involving cross-appeals. This omission has been a continuing source of frustration for judges and attorneys, and most courts have filled the vacuum by enacting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. Not surprisingly, there are many inconsistencies among these local rules.

The Committee proposes to add a new Rule 28.1 that will collect in one place the few existing provisions regarding briefing in cases involving cross-appeals and add several new provisions to fill the gaps in the existing rules. Each of the new provisions reflects the practice of a large majority of circuits, save one: Although all circuits now limit the appellee's principal and response brief to 14,000 words, new Rule 28.1 will limit that brief to 16,500 words.

2. Text of Proposed Amendments and Committee Notes

Rule 28. Briefs

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(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

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(h) ~~Briefs in a Case Involving a Cross-Appeal.~~ ~~If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order.~~

~~With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.~~ [Reserved]

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Committee Note

Subdivision (c). Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

Subdivision (h). Subdivision (h) — regarding briefing in cases involving cross-appeals — has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

Rule 28.1. Cross-Appeals

(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and

32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) Briefs. In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule

28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (11) and must be limited to the issues presented by the cross-appeal.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) **Length.**

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not

exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least

3 days before argument unless the court, for good cause, allows a later filing.

Committee Note

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary. In Rule 31 and in all rules other than Rules 28.1, 30, and 34, references to an "appellant" refer both to the appellant in an appeal and to the cross-appellant in a cross-appeal, and references to an "appellee" refer both to the appellee in an appeal and to the cross-appellee in a cross-appeal. Cf. Rule 31(c).

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

The first brief is the "appellant's principal brief." That brief — like the appellant's principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).

The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.

The third brief is the "appellant's response and reply brief." Like a response brief in a case that does not involve a cross-appeal — that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal — the appellant's response

and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-appeal, on the other, is that the latter must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.

The fourth brief is the "appellee's reply brief." Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the requirements of Rule 28(a)(2)–(3) and (11). (Rather than restating the requirements of Rule 28(a)(2)-(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-reference.) The appellee's reply brief must also be limited to the issues presented by the cross-appeal.

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the

appeal, but also as the response brief in the cross-appeal. For purposes of determining the maximum length of an amicus curiae's brief filed in a case involving a cross-appeal, Rule 29(d)'s reference to "the maximum length authorized by these rules for a party's principal brief" should be understood to refer to subdivision (e)'s limitations on the length of an appellant's principal brief.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation.

The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume

limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 34. Oral Argument

* * * * *

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

* * * * *

Committee Note

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

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3. Changes Made After Publication and Comments

The Committee adopted the recommendation of the Style Subcommittee that the text of Rule 28.1 be changed in a few minor respects to improve clarity. (That recommendation is described below.) The Committee also adopted three suggestions made by the Department of Justice: (1) A sentence was added to the Committee Note to Rule 28.1(b) to clarify that the term "appellant" (and "appellee") as used by rules other than Rules 28.1, 30, and 34, refers to both the appellant in an appeal and the cross-appellant in a cross-appeal (and to both the appellee in an appeal and the cross-appellee in a cross-appeal). (2) Rule 28.1(d) was amended to prescribe cover colors for supplemental briefs and briefs filed by an intervenor or amicus curiae. (3) A few words were added to the Committee Note to Rule 28.1(e) to clarify the length of an amicus curiae's brief.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendments.

The **Public Citizen Litigation Group** (03-AP-008) "applaud[s]" the proposed amendments, which would "streamline the briefing process and achieve national uniformity where diversity serves no purpose." Public Citizen objects, though, that the 16,500 word limit on the appellee's principal and response brief "seems a bit stingy," as this brief "combines two *principal* briefs." Public Citizen "recognize[s] that combining briefs achieves some economy," but argues that "18,000 words — or 1650 lines of text in a monospaced face — would better accommodate the needs of the appellee in complex cross appeals." As for the appellant's response and reply brief, Public Citizen argues that the

limit should be increased to 15,000 words or 1,400 lines, as this brief must serve the functions of a principal response brief (typically limited to 14,000 words or 1,300 lines) and a reply brief (typically limited to 7,000 words or 650 lines).

Philip Allen Lacovara, Esq. (03-AP-016) supports the proposed amendments, which he says are "particularly welcome." He has only a couple of objections:

1. Mr. Lacovara is concerned that use of the phrase "a case" in Rule 28.1(a) "may create an unintended ambiguity," as "[i]n most if not all circuits, each appeal, including a cross-appeal, is assigned a separate docket number and thus is technically a distinct appellate 'case,' even though the separate cases are typically consolidated." He suggests adding the following sentence at the end of Rule 28.1(a): "This Rule governs the briefs of all parties where an appeal and one or more cross-appeals are taken from the same order or judgment." This, he says, would "make clear that [the new rule] appl[ies] to all parties to all related cases involving cross-appeals from the same judgment or order."

2. Mr. Lacovara objects to the 16,500 word limit on the appellee's principal and response brief and, more generally, to giving the appellant 28,000 total words while giving the appellee only 23,500. He argues that it is "mistaken" to assume that a "cross-appeal is likely to pose relatively insignificant issues that can be treated effectively and intelligibly in a summary fashion or by simply adopting much of the appellant's opening brief." He notes that "the designation of 'appellant' and 'appellee' ... is simply the result of the fortuity of timing," meaning that "[t]he cross-appeal may be just as substantial as the opening appeal." He suggests that "a more realistic maximum" for the appellee's principal and response brief would be 21,500 words.

3. Mr. Lacovara suggests that the rule should include a requirement that "both the appellee's principal and response brief and the appellant's response and reply brief contain appropriate headings demarcating the portion of the argument that addresses that party's own appeal and the portion that is addressing the other party's appellate points."

Chief Judge Haldane Robert Mayer of the Federal Circuit (03-AP-086) reports that the judges on his circuit unanimously oppose Rule 28.1 insofar as it would increase the word limits on briefs beyond what the Federal Circuit's local rules now permit. The Federal Circuit's local rules provide for four briefs, as Rule 28.1 would, but limit those four briefs to 14,000, 14,000, 7,000, and 7,000 words, whereas Rule 28.1 would increase those limits to 14,000, 16,500, 14,000, and 7,000. Rule 28.1 would thus significantly lengthen the briefs submitted to the Federal Circuit in cross-appeals.

Judge Mayer argues that the extra space is not needed. The space permitted by the Federal Circuit in cross-appeals — 21,000 words for each side — is ample in most cases. In the rare case in which 21,000 words is insufficient, the parties can ask for permission to file longer briefs. The Federal Circuit "finds that cross-appeals are often filed improperly in order to secure an additional brief and the last word," and Rule 28.1 will "greatly exacerbate this problem" by increasing the word count for cross-appeals.

Counsel tend to use every word that they are allotted, so it is predictable that counsel will use all of the extra words that Rule 28.1 would give them. This will mean longer briefs, more repetition in briefs, and more briefing of marginal issues that counsel would otherwise drop. The courts of appeals do not need the additional work.

If a national rule regarding cross-appeals is adopted, the Federal Circuit urges that "the increased word count be limited to the subject matter of the cross-appeal, not the response to the main appeal." Many cross-appeals involve issues that are few, minor, or conditional. Under proposed Rule 28.1, parties could address such issues in a few words, and then use most of their 16,500 words on an extra-long response in the appeal.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendments. It argues, though, that the word limit on the appellee's principal and response brief should be increased to 28,000, and the word limit on the appellant's response and reply brief to 21,000. Cross-appeals often raise issues that are as significant as — if not more significant than — the issues raised in appeals. Each side should have the same number of words, and each side should be given a total of 35,000 — to allow each side to submit the equivalent of a typical principal brief on the appeal (14,000) and the cross-appeal (14,000) and the equivalent of a typical reply brief (7,000).

Senior Judge S. Jay Plager of the Federal Circuit (03-AP-297) agrees with Judge Mayer.

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) supports the proposed amendments, which "succeed in providing clarity, collecting in one place all the provisions concerning the subject matter of cross-appeals, eliminating inconsistencies among various Circuit rules, and adding new provisions to fill existing gaps." Its one objection is to the word limits. The Committee objects to giving the appellant a total of 28,000 words, but the appellee only 23,500. Although some cross-appeals are merely protective and can be addressed

with fewer words, many other cross-appeals involve difficult legal issues or complicated factual scenarios that may not have been addressed — at least adequately — in the appeal. Moreover, the designation of parties as "appellant" and "appellee" often reflects nothing more than who won the race to the courthouse; 4,500 words of briefing space should not turn on such an arbitrary matter. The Committee urges that the word limit on the appellee's principal and response brief be increased from 16,500 to 21,000.

Judge Frank H. Easterbrook of the Seventh Circuit (03-AP-367) objects to imposing a four-brief system in cross-appeals on the Seventh Circuit (which alone permits only three briefs) and argues that, if a four-brief system is to be imposed, the word limits should be adjusted "so that the normal type volume is spread across those briefs." He suggests that "[s]omething like 9,000, 13,000, 9,000, and 5,000 (18,000 words on each side, or 36,000 total) would work nicely." He points out that, if a case was so complex that more words were essential, parties could seek permission to file longer briefs. "Far better to start with 36,000 words in the normal case and go up if necessary, than to make 51,500 words the norm."

Judge Easterbrook describes the justification for the Seventh Circuit's three-brief practice as follows: "Many lawyers file unnecessary cross appeals either out of carelessness or, worse, an effort to obtain a self-help increase in the allowable type volume." Many lawyers do not realize that they do not need to file a cross-appeal to defend a judgment on a ground not relied on by the district court. Or they do realize it, but file a cross-appeal anyway, in order to get additional brief space. (Under Rule 28.1, they would get "a 50% increase for the cost of one measly appellate filling fee!") For these reasons, the Seventh Circuit went to a three-brief system, "with an invitation to counsel to apply for more words

(or a fourth brief) when there was a genuine need. Very few such applications are filed, and the number of cross appeals has substantially declined, showing that many had indeed been strategic."

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendments. It specifically "agrees that because cross-appeals are often protective in nature and the issues raised are often related to the underlying appeal, the cross-appellant does not necessarily always need as many words/length of brief as the appellant." It also points out that, if the cross-appellant needs more words, he or she can ask for them.

The **Style Subcommittee** (04-AP-A) makes these suggestions:

1. In the final sentence of Rule 28.1(b), replace "agreement of the parties" with "the parties' agreement."

2. In the final two sentences of Rule 28.1(c)(4), insert "and" in place of the period after "(11)" and delete "That brief" and "also," so that what remains is: "That brief must comply with Rule 28(a)(2)–3 and (11) and must be limited to the issues presented by the cross-appeal."

3. Rewrite Rule 28.1(f) as follows:

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(2) the appellant's principal brief, within 40 days after the record is filed;

(3) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(4) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(5) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing.

* * * * *

F. Rule 35(a)

1. Introduction

Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits follow two different approaches when one or more active judges are disqualified. Seven circuits follow the "absolute majority" approach (disqualified judges count in the base in considering whether a "majority" of judges have voted for hearing or rehearing en banc), while six follow the "case majority" approach (disqualified judges do not count in the base). Two circuits — the First and the Third — explicitly qualify the case majority approach by providing that a majority of all judges — disqualified or not — must be

eligible to participate in the case; it is not clear whether the other four case majority circuits agree with this qualification.

The Committee proposes amending Rule 35(a) to adopt the case majority approach.

2. Text of Proposed Amendment and Committee Note

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered.

A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had 8 active judges at the time; 4 voted in favor of rehearing the case, 2 against, and 2 abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in § 46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, 7 of the courts of appeals follow the "absolute majority" approach. *See* Marie Leary, Defining the "Majority"

Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

Six of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The case majority approach represents the better interpretation of the phrase "the circuit judges . . . in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c) — which defines which judges are eligible to participate in a case being heard or reheard en banc — uses the similar expression "all circuit judges in regular active service." It is clear that "all circuit judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted in the same way, the best reading of "the circuit judges . . . in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v.*

FCC, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply — and the citizens of the circuit must conform their behavior to — an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc.

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3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. The Committee Note was modified in three respects. First, the Note was changed to put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). Second, the Note now clarifies that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d) to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service — disqualified or not — are eligible to participate. Finally, a couple of

arguments made by supporters of the amendment to Rule 35(a) were incorporated into the Note.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

The **Public Citizen Litigation Group** (03-AP-008) "strongly" supports the proposed amendment.

Chief Judge Michael Boudin of the First Circuit (03-AP-009; 03-AP-192) reports that his court has abandoned the absolute majority approach in favor of the qualified case majority approach. He also reports that the First Circuit supports the proposed amendment to Rule 35(a), with one important proviso. Judge Boudin draws the attention of the Committee to 28 U.S.C. § 46(d), which provides: "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." In Judge Boudin's view, this provision *requires* the "qualification" in the "qualified case majority rule" — that is, the qualification that a case cannot be heard or reheard en banc unless a majority of *all* judges in regular active service are eligible to participate. Judge Boudin believes that the omission of an explicit quorum requirement in the proposed amendment to Rule 35(a) "is not a problem so long as the committee notes . . . make clear that the unqualified rule you propose is not intended to override any existing quorum requirement embodied in section 46(d) or — if I have misread that section — any quorum requirement that a court of appeals might reasonably adopt."

Judge J. Harvie Wilkinson III of the Fourth Circuit (03-AP-012) opposes the proposed amendment. He is "not certain why a difference in circuit practice needs to be replaced by a uniform command," especially as "[t]his is not the type of rule that affects filing deadlines or to which practitioners need to conform their conduct." He is also concerned that, under the proposed amendment, "the en banc court could be convened by less than a majority of the active judges, and that a disposition could issue from a majority of the reduced court" — something that he believes would "undermine the purpose of an institutional voice for which the en banc court was designed." Finally, he is also concerned that the proposed amendment would result in an increase in the number of en banc proceedings, consuming much-needed resources and possibly aggravating internal tensions within courts.

Chief Judge William W. Wilkins of the Fourth Circuit (03-AP-013) opposes the proposed amendment for the reasons given by Judge Wilkinson.

Philip Allen Lacovara, Esq. (03-AP-016) supports the proposed amendment: "The Advisory Committee's proposal for a single, national approach is sound. It represents a reasonable interpretation of the governing statute, 28 U.S.C. § 46(c). By analogy to the '*Chevron* doctrine,' the Advisory Committee's interpretation of the range of permissible options deserves deference."

Chief Judge Haldane Robert Mayer of the Federal Circuit (03-AP-086) reports that the judges on the Federal Circuit — which currently follows the absolute majority rule — unanimously oppose the proposed amendment. The courts of appeals should be left to interpret Rule 35(a) inconsistently. If uniformity is to be imposed, it should be the absolute majority approach followed by a majority of the circuits, not the

case majority approach followed by a minority. The case majority approach is deficient in permitting a small number of judges to issue opinions on behalf of the en banc court; for example, on a 12-member court with 5 members disqualified, 4 judges could issue en banc opinion binding all 12 judges on the court, even if 8 of the 12 judges do not agree with it. En banc review is reserved for cases of exceptional importance (or cases involving a conflict of authority), and such cases should be decided only by an absolute majority of judges. Finally, although national uniformity may be important with respect to rules that govern the conduct of the parties, it is not as important when it comes to the internal procedures of each court.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment, as it is "sensible" to "standardize" en banc procedures and to "exclude from the count those judges who are disqualified."

Senior Judge S. Jay Plager of the Federal Circuit (03-AP-297) agrees with Judge Mayer.

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) "fully supports" the proposed amendment. Practice on this issue should not vary from circuit to circuit. Moreover, the absolute majority approach is objectionable because, under it, "the disqualification of a judge is essentially deemed as a vote against granting an en banc hearing," which is "contrary to the purpose of a judge recusing him/herself."

Chief Judge Douglas H. Ginsburg of the D.C. Circuit (03-AP-368) reports that a majority of the active judges of the D.C. Circuit

oppose the proposed amendment for the reasons described by Judge Mayer.

Prof. Arthur D. Hellman of the University of Pittsburgh School of Law (03-AP-369) strongly supports the proposed amendment, largely for the reasons given by Judge Edward Carnes in his *Gulf Power Co.* opinion. Prof. Hellman writes mainly to respond to the arguments of Judge Mayer:

Judge Mayer objects that the case majority rule permits a minority of judges to control the law of the circuit. What Judge Mayer fails to acknowledge is that the absolute majority approach does exactly the same thing — and makes such a phenomenon both more likely and more pernicious. Under the absolute majority approach, a three-judge panel — perhaps a panel with one senior judge and one visiting judge in the majority, and one active judge in dissent — can decide a case in a manner that is acceptable to *no* active judge. If 6 of the circuit's 12 judges are disqualified, there is nothing that the circuit can do to correct the error.

If the panel's error is one of creating law, then the circuit may be able to take another case presenting the same issue en banc in a few years — that is, if a majority of nondisqualified judges can be mustered. (The stock holdings of the judges and a lack of turnover on the court might mean that it will be many years before a majority of nonrecused judges will be available.) In the meantime, the lower courts of the circuit are stuck applying bad law, and the citizens of the circuit are stuck conforming their behavior to bad law.

Importantly, though, the en banc court will *never* get a chance to correct the injustice inflicted on the parties in the particular case. "[T]he absolute majority rule disables the only *relevant* majority from working its will at the only time when it matters." One function of the appellate

courts is to declare and clarify law, but the more important function is to do justice in individual cases.

Judge Mayer's further argument that this issue merely relates to "the internal procedures of each court" ignores one crucial point: "By definition, a judge who is recused from participation in a case should have no influence over that case's outcome. Yet under the absolute majority rule, nonparticipation is equivalent to a 'no' vote." In other words, use of the absolute majority rule is not just a matter of how paper is pushed inside a circuit; it directly affects the rights of the parties. "Recused judges . . . have a direct influence over the outcome of the case," which violates the very notion of recusal.

Prof. Hellman points out that these concerns led to inclusion in the Judicial Improvements Act of 2002 of a provision that would have amended 28 U.S.C. § 46(c) to more clearly impose the case majority rule. That provision was dropped from the bill (which eventually became law) because Congress was informed that the Committee was actively addressing the issue. Prof. Hellman hints that if the proposed amendment to Rule 35(a) is not enacted, Congress may very well impose the case majority rule itself.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendment, largely for the reasons described in the Advisory Committee Note. The Committee believes that fundamental fairness requires that parties be treated alike under the same statute and rule, no matter the circuit in which the parties are litigating. The Committee also believes that recusal of a judge should not result in the equivalent of a vote against rehearing. Finally, the Committee criticizes the absolute majority approach because it can leave

the en banc court helpless to overturn a panel decision with which all or almost all of the active judges disagree.

Citizens for Voluntary Trade (03-AP-414) supports the proposed amendment. The argument of the Federal Circuit that each circuit should be free to choose its own approach has already been rejected by Congress (which enacted a national statute) and the Supreme Court (which promulgated a national rule). The specter of a minority of active judges issuing an en banc opinion for the court — which can occur under the case majority approach — is not terribly troubling, given that several circuits have already adopted the case majority approach and given that *every* en banc opinion of the Ninth Circuit is issued by a minority of active judges (sometimes by less than a quarter of the active judges). More importantly, counting recused judges in the base violates general principles of parliamentary law and unfairly prejudices the litigant seeking rehearing, because it counts each recused judge as the equivalent of a vote against rehearing.

Chief Judge James B. Loken of the Eighth Circuit (03-AP-499) reports that "[t]en of the eleven Eighth Circuit judges who responded on this question, including all eight active judges, join the Federal Circuit in opposing the adoption of proposed Rule 35(a)." Those judges opposed Rule 35(a) because they did not believe that a national rule is "necessary []or appropriate." In addition, some judges opposed Rule 35(a) because the case majority rule makes en banc rehearings more likely — and such rehearings "require a large investment of our widely-dispersed judicial resources, a geographical factor that is doubtless not uniform among the circuits."

The **Style Subcommittee** (04-AP-A) makes no suggestions.

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